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No .....

IN THE

Supreme Court of the United States

October Term 1980

HARRY LLOYD MILHAN,

Petitioner,

vs.

MARY LEE MILHAN,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of California.

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Petition for a Writ of Certiorari to the Supreme Court of California.

Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the Supreme Court of the State of California

Questions Presented.

1. Whether federal military retired pay is community property subject to division with a non-military ex-spouse upon dissolution of marriage?

2. Whether a serviceman's election under 38 U.S.C. §3105 to receive a Veteran's Administration disability pension in lieu of military retired pay may be ignored and nullified by state marital property law?

3. Whether a state's evaluation of a National Service Life Insurance policy and a "compensatory" off-setting award of other property to a non-beneficiary ex-spouse during marital dissolution proceedings does not impermissibly interfere with the federal military compensation and insurance system?

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Report of Opinion Below.

The opinion of the California Supreme Court below, reported at 27 Cal.3d 765 (1980), is reproduced in Appendix A.

Jurisdiction.

The decision of the California Supreme Court sought to be reviewed was filed July 17, 1980. This petition was filed within the time specified in 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved.

United States Constitution, art. VI, cl. 2.

Petitioner was retired pursuant to 10 U.S.C. §6323, the pertinent parts of which are set out in Appendix B.

Pertinent portions of Title 10 U.S.C. §§1431, 1434, 1440 (Retired Serviceman's Family Protection Plan) and Title 10 U.S.C. §§1447, 1450 (Survivor Benefit Plan) are set forth in Appendix B.

The statutes protecting military retired pay and other benefits from diversion to non-military recipients, Title 10 U.S.C. §§2771, 7601, Title 31 U.S.C. §203, and Title 37 U.S.C. §§701, 705, 801 are contained in Appendix B.

Husband's disability pension election is secured by Title 38 U.S.C. §3105 set out in Appendix B.

Husband has continuing obligations and duties to the military as set forth in Title 10 U.S.C. §6481 in Appendix B.

Statement of the Case.

Husband and Wife were married in 1944 immediately following Husband's graduation from the United States

Naval Academy. After a military service career of over twenty years, Husband retired from the Navy in 1965.

At the time of marriage and throughout his military service, Husband was a permanent resident and domiciliary of the State of Colorado although, as military families must, the parties temporarily resided in several other states during this time. It was not until Husband retired after two decades of military service that the parties assumed permanent residence and domicile in the State of California.

In 1968, Wife commenced proceedings for dissolution of marriage and later moved to Idaho with some of the parties' minor children. To enable her to remarry, a decree of dissolution was entered on February 17, 1970.

In initial trial court and appellate proceedings, judgment was entered providing that Husband's military retired pay and certain military life insurance policies were his separate property. Ultimately, however, the California Supreme Court ruled that federal military retired pay could properly be subjected to state community property law, *In re Marriage of Fithian*, 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449 (1974), and that the military servicemen's life insurance policies were amenable to similar treatment. *In re Marriage of Milhan*, 13 Cal.3d 129, 117 Cal.Rptr. 809, 528 P.2d 1145 (1974), *cert. denied*, 421 U.S. 976 (1975).

The remittitur of the California Supreme Court was filed on January 16, 1975, and over a year later, Wife filed motions in the trial court for judgment pursuant to the California Supreme Court decision, restitution after reversal and attorneys fees. After extended proceedings on these motions, the trial court entered judgment on March 7, 1978.

Despite Husband's objections throughout the proceedings, the trial court ruled that Husband's United States Navy retired pay and his military life insurance policies were

subject to a one-half community property interest of the Wife. Although not required to do so, the trial court made its judgment retroactive and ordered that Husband pay one-half of all military retired pay he had received between May, 1972, and March, 1978, together with one-half of all retired pay received thereafter. In addition, Husband was ordered to pay over one-half of the cash surrender value of his military serviceman's life insurance policy.

At no time has Wife demonstrated financial need for spousal support. Wife was, and is, a successful stock broker in Idaho and, although apparently now once again divorced, was married throughout most of the proceedings to an investment company executive.

On July 17, 1980, following extended appellate proceedings,[1] the California Supreme Court affirmed the trial court judgment and held that despite this Court's decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), California was not precluded from applying its community property law to military retired pay, military insurance policies, or veterans disability pay received in lieu of retired pay.

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[1]The California Court of Appeal, Second District, relying on this Court's *Hisquierdo* decision, reversed the trial court and ruled in favor of Husband, that his military retired pay, life insurance policies and disability pension were not subject to community claims. *In re Marriage of Milhan*, 97 Cal.App.3d 41, 158 Cal.Rptr. 523 (1979). That decision was vacated, however, when the California Supreme Court granted its hearing in the case.

ARGUMENT.

I.

THE DECISION OF THE STATE COURT BELOW IS IN CONFLICT WITH ANOTHER STATE DECISION ON THE PRECISE ISSUE PRESENTED.

Relying on this Court's decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), the Alaska Supreme Court held in *Cose v. Cose*, 592 P.2d 1230 (Alaska 1979), that federal military retired pay was not marital property divisible on dissolution of marriage.[2] Other states have reached a substantially similar result. *Ellis v. Ellis*, 191 Colo. 317, 552 P.2d 506 (1976); *Fenney v. Fenney*, 259 Ark. 858, 537 S.W.2d 367 (1976).

In stark contrast, the California Supreme Court ruled below that despite *Hisquierdo v. Hisquierdo*, and recent federal legislation the state was "not precluded" from application of its community property law to military retired pay, military insurance policies, or veteran's disability pay received in lieu of retired pay. *In re Marriage of Milhan*, 27 Cal.3d 765, 780 (1980).

Other states have also reached California's result. *See, e.g., Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *Payne v. Payne*, 82 Wash.2d 573, 512 P.2d 736 (1973).

The result of this haphazard patchwork state of the law falls particularly hard on career military personnel. Unlike virtually any other occupation or employment one can name, the military serviceman is subject to recurring obligations to relocate himself, and often his family, all over the United States and to many corners of the world. The serviceman

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[2]*Cose* is presently before this Court on petition for writ of certiorari. Docket Number 79-1469.

is not free to choose the jurisdiction in which he will be assigned for duty or to refuse a duty assignment once made.

The property consequences are apparent and profound. Depending upon where the serviceman is assigned, the military retired pay which is earned can be treated as non-divisible separate property income or marital property to which the non-military ex-spouse has a continuing and unfettered claim.

Fundamentally, it is federal law that must govern the interpretation of a federal right. *Free v. Bland*, 369 U.S. 663, 669-70 (1962). The right to receive military retired pay must, accordingly, not be subjected to varied and conflicting interpretations and applications at the hands of the several states effecting their parochial approaches to marital property law.[3]

The conflict among the approaches of the various states to the treatment of federal military retired pay on dissolution of marriage has existed for some time. However, that conflict has become even more pronounced with the decisions in *Cose* and *Milhan* which have interpreted this Court's opinion in *Hisquierdo* in completely different ways. The Court's review is both appropriate and necessary to settle the issue once and for all.

II.

THE DECISION OF THE STATE COURT BELOW IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

A. State Marital Property Law Cannot Constitutionally Be Applied to Federal Military Retired Pay in Light of Hisquierdo v. Hisquierdo.

In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), this Court held that certain federal Railroad Retirement Act ben-

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[3]As recently as its major legislative effort on the Bankruptcy Act of 1978, Congress recognized explicitly the benefits accruing when a federal scheme is not left solely to the push and pull of state law: now, a debtor may elect a schedule of *federal* property exemptions rather than the state exemptions which vary widely. *See* 11 U.S.C. §522(b).

efits were not subject to state community property claims and it reversed the California Supreme Court which had ruled that they were.

In its consideration of *Hisquierdo*, the Court was compelled by the Supremacy Clause (U.S. Const., art. VI, §2) to determine whether a conflict existed between state community property concepts and overriding federal law. The inquiry was straightforward and guides the analysis here:

> "The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo v. Hisquierdo*, 439 U.S. at 583.

1. The Federal Military Retired Pay Program Has Substantially Similar Characteristics to the Railroad Retirement Scheme.

As an aid in determining the objectives of the federal benefit program in *Hisquierdo*, this Court identified the significant attributes of the federal Railroad Retirement scheme. In every material respect, the federal Railroad program is virtually identical with the military retired pay system; accordingly, the latter should be equally shielded from interference by conflicting state property laws.

From their inception, Railroad Retirement benefits and military retired pay both have "federal overtones," *Hisquierdo v. Hisquierdo*, 439 U.S. at 582; 10 U.S.C. §6323, and are thus markedly distinguishable from situations in which state community property assets are utilized to purchase federal savings bonds or the like. *See, e.g., Free v. Bland*, 369 U.S. 663 (1962). Further, it can be said of both Railroad and military retired benefits that "[c]ompulsory federal taxes finance them and not just the taxes that fall on the employee." *Hisquierdo v. Hisquierdo*, 439 U.S. at 582. Indeed, unlike the Railroad worker who pays a specific tax to fund his retirement plan, 26 U.S.C. §§3201-3233,

the military officer makes no specific contribution toward his retired pay. Thus, in that respect the military retired system is even more completely a federal creature than is the Railroad retirement program.

The Court noted, too, that federal Railroad retirement is not contractual. Likewise, federal military retired pay "is not based upon an express or implied contract, but is governed entirely by statute." *United States v. Smith,* 393 F.2d 318, 321 (5th Cir. 1968); *see U.S. v. Larionoff,* 431 U.S. 864 (1977).

The Court stressed that the spouse (and other dependents) were specifically provided for in the Railroad Retirement scheme. *See* 45 U.S.C. §231a(c)-(d). It observed, however, that such benefits were cut off when the railroad worker and the spouse were divorced. 45 U.S.C. §231d(c)(3). The military retirement program also provides for the wife and dependents of the retired serviceman, *see* 10 U.S.C. §§1431, 1447, and, significantly, the entitlement to such benefits terminates in the event of remarriage. 10 U.S.C. §1450(b). Medical, commissary and exchange privileges available to the retired servicemen and their widows are not available to an ex-wife. *See* 10 U.S.C. §7601(a).

In the Court's view the critical provisions of the Railroad Retirement Act included its identification of a specified beneficiary who is protected by a prohibition against attachment and anticipation of the benefits. *Hisquierdo v. Hisquierdo*, 439 U.S. at 582. The retired serviceman is, of course, the specified beneficiary of military retired pay; indeed, Congress has even referred to military retired pay as the serviceman's "personal entitlement." S. Rep. No. 1480, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 3294, 3300. In addition, the serviceman's retired pay is protected by not merely one but an entire array of statutory bars to its diversion elsewhere

than to the member himself. *See, e.g.*, 37 U.S.C. §§701(a), (c), 705; 10 U.S.C. §1440; 31 U.S.C. §203. In this particular regard, Congress has clearly indicated its intent to take whatever steps may be necessary to "safeguard the [retired serviceman's] future retired pay . . . ." [1968] U.S. Code Cong. & Ad. News, *supra* at 3307. *See also United States v. Smith*, 393 F.2d 318 (5th Cir. 1968); *Arnold v. United States*, 331 F.Supp. 42 (S.D. Tex. 1971).

In sum, the military retired pay program established and administered by the federal government exhibits characteristics—including benefits, recipients covered, and protections—which are not materially different from those of the Railroad Retirement Act analyzed by this Court in *Hisquierdo*. *See In re Ramsey*, 612 F.2d 1220, 1221 n. ! (9th Cir. 1980). Indeed, in the areas addressed by the Court, Congress has been equally careful in extending, shaping and defining the nature and scope of the federal rights it creates.

2. State Community Property Claims to Military Retired Pay Interfere and Conflict With the Objectives of Supreme Federal Law.

The ultimate question for disposition here is the same as that framed in *Hisquierdo:* Whether the asserted state property right conflicts with federal law and injures the "objectives" of the federal program. As will be shown, recognition of a community property claim to military retired pay accomplishes precisely what supreme law forbids: There is a resultant interference with the Congressional allocation of limited federal benefits. When federal objectives are thus thwarted, the state law must give way. U.S. Const., art. VI, §2; *Free v. Bland*, 369 U.S. 663 (1962); *Wissner v. Wissner*, 338 U.S. 655 (1950).

Recognition of a community property claim in federal military benefits not only "conflicts" with a number of the

Congressional objectives embodied in the military retirement scheme, it would frustrate them entirely:

a. *Beneficiary Designation*. Congress has specifically given the serviceman the paramount right to designate, effective upon his death, a beneficiary who is entitled *above all others* to receive pay arrearages or other amounts due in a final settlement of his accounts. 10 U.S.C. §2771. If state community property claims to military retired pay were valid, the serviceman could not, of course, unilaterally divest the wife's rights in it. *See* Cal. Civ. Code §§5105, 5125(b). Yet, this is what Congress has specifically authorized in recognition that the serviceman's pay is his "personal entitlement." Clearly, a state community property claim is irreconcilable to the federal objective and, if given effect, would frustrate that objective altogether.

b. *Annuity Plans*. Congress has specifically given the serviceman the unfettered right to use up to fifty percent of his military retired pay to purchase annuities which are payable on his death to beneficiaries he alone specifies. 10 U.S.C. §§1431-1446. (Retired Serviceman's Family Protection Plan); 10 U.S.C. §§1447-1455 (Survivor Benefit Plan). The federal annuity scheme provides for a range of permissible beneficiaries which need not include the spouse. *See* 10 U.S.C. §1434; 10 U.S.C. §1450(a)-(b). But, if a state law community property interest in the retired pay were recognized, the spouse could object to the use of "her" property for an annuity in which she did not share and thereby frustrate the Congressional plan.

Congress clearly had the former spouse in mind when it enacted these plans. Under the Survivor Benefit Plan, for example, the annuity—purchased with retired pay in which the spouse may be claiming a perfected state law property interest—ends if the serviceman's widow remarries. 10 U.S.C. §1450(b). In still further expression of its intent to

protect surviving *dependents*—and not a remarried *former spouse*—Congress has specifically defined the "widow" who is entitled to the annuity as the surviving "wife." 10 U.S.C. §1447(3). The same distinctions have been drawn by Congress in the Family Protection Plan provisions. 10 U.S.C. §§1434, 1435. Once again, if the state community property claim were given effect, it would completely frustrate the Congressional plan.

A pertinent policy aspect of the annuity plans is observed in the Survivor Benefit Plan under which the annuity to the serviceman's *widow* is ended on her remarriage. 10 U.S.C. §1450(b). Yet, if an ex-wife's community property claim to the retired pay were given effect, it would become at dissolution her separate property and would—as the judgment below provides[4]—continue despite her remarriage. Inasmuch as Congress has demonstrably elected *not* to provide for the ex-wife, it is necessary to conclude either that those who are express beneficiaries of Congress' protection (servicemen's widows) are to be treated worse than those it neglected (ex-wives), or, more logically, that those it neglected were never intended to have any community property claim.

c. *Disability Benefit Conversion*. Congress has afforded the serviceman the statutory right to waive all or some lesser part of his retired pay to receive a disability pension from the Veteran's Administration. 38 U.S.C. §3105. While the primary incentive for such a waiver might be advantageous tax treatment, 26 U.S.C. §104(a), or shielding the disability pension from Husband's creditors, another consequence also flows from the serviceman's disability election. Under fed-

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[4]Wife has long since remarried; yet, the judgment provides for her continued receipt of one-half of Husband's military retired pay as he receives it in the future.

eral law, the retired pay—subject to the alleged state community property law claim—would, as disability benefits, become a "gratuity," *see, e.g., Lynch v. United States,* 292 U.S. 571, 577 (1934); *Berkey v. United States,* 361 F.2d 983, 987-88 (Ct. Cl. 1966), which is separate property, Cal. Civ. Code §§5107, 5108, not subject to claims of the other spouse. The judgment below nullifies the disabled Husband's election in this regard.

B. Community Property Claims Conflict With Federal Decisions Defining the Nature of Military Retired Pay.

Following this Court's decision in *U.S. v. Larionoff,* 431 U.S. 864 (1977), the Court of Appeals for the Ninth Circuit held that military retired pay "does not differ from active duty pay in its character as pay for *continuing military service.*" *Costello v. U.S.,* 587 F.2d 424 (9th Cir. 1978), *cert. denied,* 442 U.S. 929 (1979) (emphasis added). Indeed, military retired pay has long been considered to be compensation paid in consideration of the serviceman's continued availability to the military establishment. *See, e.g., Hostinsky v. United States,* 292 F.2d 508, 510 (Ct. Cl. 1961); *Lemly v. United States,* 75 F.Supp. 248, 249 (Ct. Cl. 1948).

The judicial recognition that a retired military serviceman receives his retired pay for continuing services to the country is well-founded. At the outset of his retirement, Husband was restricted in the businesses he could pursue and would have forfeited his retired pay if his conduct was in violation of law. 37 U.S.C. §801(c). On a continuing basis, he is obligated to submit to recall to active duty in the service of his country. 10 U.S.C. §6481. Indeed, Husband is still considered to be a member of the armed services. *See, e.g., United States v. Hooper,* 9 C.M.A. 637 (1958).

The vice of a state-imposed marital property claim is that it inequitably casts upon *one* member of the former marital community the continuing burdens of earning the military retired pay which is enjoyed by *both*. If the retired pay system is to successfully function as a career incentive and an inducement for the post-retirement lifetime availability to the military of the knowledge and experience represented in the pool of retired servicemen, then the retired pay cannot be diverted to an ex-spouse who does not contribute to earning it.

Non-division of retired pay, moreover, does not result in injustice because, as this Court pointed out in *Hisquierdo*, marital *support*—which would take into account the military member's ability to pay as well as the ex-spouse's demonstrated need—would still be a remedy available to state courts.[5]

C. Hisquierdo v. Hisquierdo Disapproved the Evaluation and "Off-Setting Award" Approach Required by the Judgment Below.

In *Hisquierdo* this Court specifically disapproved the *Milhan* "evaluation and award of other property" approach to avoiding conflicts with supreme federal law. *Hisquierdo v. Hisquierdo*, 439 U.S. at 588. In addition, in analysis relevant here, it struck down the retention of jurisdiction by the state court to enforce payments of the federal benefits as they were received.

Justice Blackmun noted a number of infirmities to the state court *Hisquierdo* judgment which are equally present here. First, like the single provision in the Railroad Retire-

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[5]The 1975 and 1977 amendments to the Social Security Act—discussed in *Hisquierdo*—reflect precisely this "support" approach to state marital property claims, as opposed to a "property division" approach. *See* 42 U.S.C. §§659, 662(c).

ment Act, 45 U.S.C. §231m, a panoply of statutes protect federal military retirement benefits from diversion, *see, e.g.*, 37 U.S.C. §§701(a), (c), 705; 10 U.S.C. §1440; 31 U.S.C. §203; 38 U.S.C. §3101(a), and those statutes preempt all state law in their way. Second, the federal military retirement scheme involves carefully targeted benefits (*e.g.*, enhanced retired pay schedules, dependent annuity benefits which terminate on remarriage, disability pension options), one of the primary objectives of which is to induce careers in the military services. Together, as in *Hisquierdo*, these characteristics reflect Congress' care in the husbanding of finite federal benefit funds. A state court judgment requiring payment of those funds as periodically received would directly frustrate that legislative program.

Hisquierdo is directly pertinent with respect to the state court's recognition of a community property interest in Husband's military life insurance policies.

Substantively, the Court indicated that the Congressional protections afforded to military life insurance policies are similar in nature and scope to those found in the Railroad Retirement Act. *Hisquierdo v. Hisquierdo*, 439 U.S. at 582. Consequently, the solicitude for the recipients of federal Railroad Retirement benefits evidenced in *Hisquierdo* must guide the inquiry here.

Procedurally, the decision in *Hisquierdo* is equally significant. Responding to the argument that a *Milhan* (*In re Marriage of Milhan*, 13 Cal.3d 129 (1974)) "offsetting award" approach to receipt of the asserted community share in the federal benefits could avoid interference with the federal scheme, the Court stated:

> "An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely would a regular deduction from

his benefit check." *Hisquierdo v. Hisquierdo,* 439 U.S. at 588.

Despite this guidance, the California Supreme Court has persisted in its use, with respect to Husband's military service life insurance policies, of the very evaluation and "offsetting award" approach found defective in *Hisquierdo.*

D. The State Court Nullified Husband's Disability Pension Election.

In its decision below, the California Supreme Court explicitly nullified Husband's disability pension election and deemed the pension he receives for his military service disability to be a property interest divisible with his ex-spouse. Thus, the disabled serviceman here must share one-half of his disability pension with Wife although she patently requires no compensation—as Husband is surely entitled to—for disabling conditions arising from service to the country.

The federal disability election is granted by Congress without restrictions as to its time of exercise or its consequences. 38 U.S.C. §3105. Yet, the California court's application here of the rule it established in *In re Marriage of Stenquist,* 21 Cal.3d 779, 148 Cal.Rptr. 9, 582 P.2d 96 (1978), ignores and effectively nullifies that election. In the eyes of the state court, it is as if the election rights secured by supreme federal law did not exist.

III.

THE DECISION OF THE STATE COURT BELOW INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

As outlined in previous sections, the case law defining marital property rights in military retired pay is in conflict

from jurisdiction to jurisdiction and between the state and federal courts. Unfortunately, legislative guidance provides little additional assistance.

This Court's opinion in *Hisquierdo* analyzed the impact of the 1975 and 1977 amendments to the Social Security Act but military retired pay has yet to be construed in their light. If this legislation accurately reflects a Congressional balance between state marital property interests and federal fiscal interests then the analysis should be applicable in the context here under consideration.

It is noteworthy, too, that Congress has explicitly recognized community property claims but only to the limited extent that Civil Service Retirement pay is now subject to property division for community property purposes. 5 U.S.C. §8345(j). In stark contrast, bill after bill has been introduced over the last few years to recognize a community property claim in military retired pay but none has ever been reported out of committee. *See* H.R. Rep. No. 2817, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 11354, 95th Cong., 2d Sess. (1978); H.R. Rep. No. 13020, 95th Cong., 2d Sess. (1978).

With legislative resolution of the issue not apparently likely in the foreseeable future and with the judge-made law in disarray, the thousands of servicemen and their families are left without authoritative guidance in this important area. Moreover, at a time when success of the all-volunteer military is in doubt and the services face the challenge of retaining experienced career personnel, the need to define the nature and scope of rights to military benefits—retired pay, life insurance and disability pensions—has become particularly acute. The matter now before the Court presents the opportunity of resolving these vital questions.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the decision of the Supreme Court of California in this action.

Dated: October 9, 1980.

Respectfully submitted,

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APPENDICES

APPENDIX "A".

[L.A. No. 31191, July 17, 1980.] In re the Marriage of MARY LEE and HARRY LLOYD MILHAN. MARY LEE MILHAN, Appellant, v. HARRY LLOYD MILHAN, Appellant.

OPINION

BIRD, C. J.—The principal issue in this dissolution action is whether the Supreme Court in *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572 [59 L.Ed.2d 1, 99 S.Ct. 802], implicitly held that community property states could not apply their laws in dividing as part of the community a husband's military pension, insurance policy, and disability pay which he received in lieu of retirement.

I.

Following his graduation from the United States Naval Academy in 1944, Mr. Milhan married Mrs. Milhan. The Milhans' marriage was dissolved in 1970, five years after Mr. Milhan retired from the Navy and began receiving retirement pay. In 1972, Mr. Milhan was awarded as separate property his retirement pension and two military insurance policies which had been purchased with community funds.

This court reversed that judgment in *In re Marriage of Milhan* (1974) 13 Cal.3d 129 [117 Cal.Rptr. 809, 528 P.2d 1145], certiorari denied (1975) 421 U.S. 976 [44 L.Ed.2d 467, 95 S.Ct. 1976]. (*Milhan I.*) Relying on *In re Marriage of Fithian* (1974) 10 Cal.3d 592 [111 Cal.Rptr. 369, 517 P.2d 449], certiorari denied (1974) 419 U.S. 825 [42 L.Ed.2d 48, 95 S.Ct. 41], this court held that Congress had not preempted the application of California community property law to federal military pensions. The court also rejected the claim that *Wissner v. Wissner* (1950) 338 U.S. 655 [94 L.Ed. 424, 70 S.Ct 398] required California to

classify military insurance policies as separate property. A federal interest was recognized in protecting a serviceman's right to specify the beneficiary of a military insurance policy. However, California courts could nonetheless evaluate "the community interest in a military life policy and award [] the insured's spouse an equivalent amount in *other* property available for disposition. [Fn. omitted.]" (*Milhan I, supra,* 13 Cal.3d at p. 133.)

This court issued its remittitur, and a hearing was held by the trial court. Mr. Milhan testified that he had elected to receive $106 disability compensation from the Veterans' Administration in lieu of an equal amount of retirement pay. The trial court awarded Mrs. Milhan half of Mr. Milhan's retirement pay, as well as a sum equivalent to half of the cash surrender value of the military insurance policies at the time of trial. Mrs. Milhan was also awarded restitution for one-half of the retirement pay received by Mr. Milhan after May 2, 1972.[1] Mr. Milhan's Veterans' Administration disability pay was not included in the judgment.

Relying on the post-*Milhan I* decision in *Hisquierdo v. Hisquierdo, supra,* 439 U.S. 572,[2] Mr. Milhan appealed contending that the award to Mrs. Milhan of pension funds

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[1]The trial court awarded Mrs. Milhan the legal rate of interest on her half of the retirement pay due on and after May 2, 1972, as well as on the amount due in lieu of her share in the insurance policies. The trial court provided that the interest would be computed from the date on which this court's remittitur was filed. Mr. Milhan was allowed to make monthly payments totalling $300 in lieu of lump sum restitution of retirement benefits received between May 2, 1972, and February 1976, and in lieu of immediate payment of half of the cash surrender value of the insurance policies. Mrs. Milhan was awarded attorneys' fees of $1,500.

[2]The Supreme Court reversed the decision of this court in *In re Marriage of Hisquierdo* (1977) 19 Cal.3d 613 [139 Cal.Rptr. 590, 566 P.2d 224], and remanded the case for further proceedings not inconsistent with its opinion.

and of property equivalent to her community property interest in the military insurance policies was error. He also claimed the court erred when it awarded interest and attorneys' fees and refused certain credits against the award of back pay.[3] Mrs. Milhan cross-appealed, attacking the trial court's failure to award her a community property share in the Veterans' Administration disability pay received by Mr. Milhan in lieu of retirement pay, and the court's failure to divide the retirement pay from the date of trial in 1970.[4]

II.

In *Hisquierdo v. Hisquierdo, supra,* 439 U.S. 572, the Supreme Court considered whether the supremacy clause[5] precludes state courts from applying community property law to pensions payable under the federal Railroad Retirement Act of 1974. (45 U.S.C. § 231 et seq.) The court found that benefits under the act were provided to "support . . . [former] employees[] [in their] old age and to encourage . . . employee[s] to retire." (*Hisquierdo, supra,* 439 U.S. at p. 585 [59 L.Ed.2d at p. 13].) Application of state community property law, the court reasoned, would frustrate

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[3]In addition, Mr. Milhan argued that the trial court erred in failing to make any provision regarding his obligations with respect to the military retirement pay if Mrs. Milhan should predecease him. However, California law is clear that "the heirs of the ex-wife are not entitled to the portion of the retirement benefits the ex-wife would have received had she lived." (*In re Marriage of Fithian, supra,* 10 Cal.3d at p. 601.) There was no need for the trial court to restate this principle in the judgment.

[4]Mrs. Milhan's contention that the decision in *Milhan I* is the final law of the case is incorrect inasmuch as *Hisquierdo* was decided while the appeal herein was pending. (See *Subsequent Injuries Fund v. Ind. Acc. Com.* (1960) 53 Cal.2d 392, 395 [348 P.2d 193].)

[5]"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI, cl. 2.)

the congressional objective in two ways. First, the reduction of benefits would *discourage* the employee from retiring. Second, state law would *encourage* divorced employees to "keep working, because [their] former spouse[s] [have] no community property claim to salary earned after the marital community is dissolved." (*Ibid.*) Accordingly, the court held that 45 United States Code section 231m precludes both the division of railroad pensions as community property and the award of an equivalent amount of other property to the nonemployee spouse.[6]

(1) The Supreme Court has long recognized that the " 'whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.' " (*Hisquierdo, supra,* 439 U.S. at p. 581 [59 L.Ed.2d at pp. 10-11] (citation omitted); see also Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA* (1978) 25 UCLA L.Rev. 417, 483-485.) Accordingly, federal preemption will apply only where " 'positively required by direct enactment' " (*Hisquierdo, supra,* 439 U.S. at p. 581 [59 L.Ed.2d at p. 11], citation omitted), and only insofar as necessary to protect specific federal interests. "State family and family-property law must do

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[6]The Railroad Retirement Act provides a separate benefit to nonemployee spouses which is terminated upon dissolution of the marriage. (45 U.S.C. § 231d(c)(3).) The court found this termination to manifest a "deliberate" congressional choice to exclude nonemployee spouses from any community property claim to the pension provided employees. (*Hisquierdo, supra,* 439 U.S. at p. 585 [59 L.Ed.2d at p. 13]. See discussion *infra,* pp. 774-775.

The broad language of 45 United States Code section 231m protects this congressional allocation of benefits: "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ."

'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden.'' (*Id.* Citation omitted.) ''The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.'' (*Hisquierdo, supra,* 439 U.S. at p. 583 [59 L.Ed.2d at p. 12].)

Mr. Milhan contends that *Hisquierdo, supra,* 439 U.S. 572, governs the assets divided by the trial court in this case. (2) Specifically, he claims that neither military retirement pay nor disability pay received in lieu thereof may be divided as community property. Further, California courts may not award an equivalent amount from other property to compensate for a community property interest in military insurance policies. In effect, Mr. Milhan contends that *Hisquierdo* implicitly disapproved this court's holdings in *In re Marriage of Fithian, supra,* 10 Cal.3d 592,[7] *In re Marriage of Stenquist* (1978) 21 Cal.3d 779 [148 Cal.Rptr. 9, 582 P.2d 96], and *Milhan I, supra,* 13 Cal.3d 129. However, the principles which required preemption in *Hisquierdo* yield a different result when applied to the facts of this case.

In *Fithian,* this court found that ''California community property law [does not] interfere[] in any way with the administration or goals of the federal military retirement pay system. . . .'' (*Fithian, supra,* 10 Cal.3d at p. 604.) Accordingly, the court held that state law was not preempted.

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[7]Citing *Gorman v. Gorman* (1979) 90 Cal.App.3d 454 [153 Cal.Rptr. 479], this court indicated in *Henn v. Henn* (1980) 26 Cal.3d 323, at page 328, footnote 3 [161 Cal.Rptr. 502, 605 P.2d 10], that *Hisquierdo* does ''not compel reconsideration of our holding in *Fithian*. . . .'' However, the issue was not briefed by the parties in *Henn,* and the court's reasons for so holding have not been fully explained.

Nothing in *Hisquierdo* conflicts with this conclusion. Military retirement pay was enacted, inter alia, to "provide [servicemen] with an incentive to *remain* in the armed services. . . ." (*Id.*, at p. 599. Italics added.) The federal interest which required preemption in *Hisquierdo*—an incentive for pension holders to retire—does not exist in the military retirement system.[8]

Hisquierdo is also consistent with this court's conclusion in *Fithian* that Congress did not intend "to preserve the benefits of the [military retirement] system as the separate property of the recipient." (*Fithian, supra,* 10 Cal.3d at p. 599.) The Supreme Court's finding of congressional intent to preempt community property laws applicable to railroad retirement pensions rested on two principal grounds. Neither applies to military pensions.

First, *Hisquierdo* relied on the statutory immunity of railroad pensions from taxation, attachment, garnishment, as-

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[8]Mr. Milhan repeats many of the arguments rejected in *Fithian*. For example, he contends that application of state community property principles to military pensions is inconsistent with the right of servicemen to designate a beneficiary to receive pay arrearages or other amounts due on their death in settlement of their accounts. (10 U.S.C. § 2771.) Further, he argues that California law interferes with the right of servicemen to use a portion of their pay to purchase annuities payable on their death to beneficiaries including persons other than a spouse. (10 U.S.C. § 1431 et seq. [Retired Serviceman's Family Protection Plan]; 10 U.S.C. § 1447 et seq. [Survivor Benefit Plan].) Since *Hisquierdo* sheds no new light on these contentions, there is no need to supplement the discussion in *Fithian*.

Mr. Milhan also contends that the decision of the United States Court of Appeals in *Costello v. United States* (9th Cir. 1978) 587 F.2d 424, established that military retirement benefits are paid in consideration of continued services to the military establishment. *Costello* held that retired military personnel have no vested right to retired compensation at the rate in effect on the date of their retirement. This holding rested principally upon the finding that military retirement pay is not received entirely for past services. However, the issue in *Costello* was far removed from the problem of classifying retirement benefits under state community property law, and is not authoritative on the latter issue. (See *Fithian, supra,* 10 Cal.3d at p. 603.)

signment, and other "legal process." (45 U.S.C. § 231m.) This statute also prohibits the "anticipation" of railroad pension benefits. (*Id.*) Counsel have not cited, nor has independent research revealed, any federal statute which similarly shields military pensions. Thus, Congress has not " 'positively' " and " 'by direct enactment' " precluded California courts from applying community property rules to such pensions (*Hisquierdo, supra,* 439 U.S. at p. 581 [59 L.Ed.2d at p. 11], quoting *Wetmore v. Markoe* (1904) 196 U.S. 68, 77 [49 L.Ed. 390, 394, 25 S.Ct. 172].)[9]

Second, *Hisquierdo* relied on the provision of a separate benefit for spouses which is terminated on dissolution of marriage. (45 U.S.C. § 231d(c)(3).) The court stated: "Congress carefully targeted the benefits created by the

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[9]10 United States Code section 1440 applies only to annuities payable under the Retired Serviceman's Family Protection Plan. (10 U.S.C. § 1431 et seq.) It is not applicable to Mr. Milhan's Navy retirement pay. (Accord *Czarnecki v. Czarnecki* (1979) 123 Ariz. 466 [600 P.2d 1098]; *In re Marriage of Musser* (1979) 70 Ill.App.3d 706 [388 N.E.2d 1289].) Since military retirement pensions are not administered by the Veterans' Administration, they are also outside the scope of 38 United States Code section 3101. Mr. Milhan cites only four other provisions. 37 United States Code section 701(a) and (b) allows Army and Air Force officers and certain contract surgeons to assign their pay pursuant to appropriate regulations, while section 701(c) forbids enlisted personnel from these services from doing so. 31 United States Code section 203 applies only to the transfer and assignment of claims against the United States.

Mr. Milhan forcefully contends that a congressional intent to preempt state community property law applicable to military retirement pay is established by two recent amendments to the Social Security Act, codified at 42 United States Code sections 659 and 662(c). These amendments apply to 45 United States Code section 231m and "similar provisions in all other federal benefit plans." (*Hisquierdo, supra,* 439 U.S. at p. 576 [59 L.Ed.2d at p. 7].) The amendments create an exception for child support and alimony claims, with "alimony" defined to explicitly exclude community property claims. However, since military retirement pay is not shielded by any statute similar to 45 United States Code section 231m, the scope of the exception created by these amendments, and the policy implications, if any, to be drawn are not material to this case.

Railroad Retirement Act. It even embodied a community concept to an extent. The Act provides a benefit for a spouse, but the spouse need not have worked for a carrier. The spouse's sole contribution is to the marital community that supports the employee who has made railroad employment a career. Congress purposefully abandoned that theory, however, in allocating benefits upon absolute divorce. In direct language the spouse is cut off. . . ." (*Hisquierdo, supra,* 439 U.S. at p. 584 [59 L.Ed.2d at p. 13].) The court further emphasized that "[d]ifferent considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates." (*Id.*, at p. 590, fn. 24 [59 L.Ed.2d at p. 16].)

It is irrelevant that the military retirement scheme is a public program. The scheme does not contain a separate spousal benefit which is purposefully cut off upon dissolution. Instead, the scheme contains two different annuity plans, the Retired Serviceman's Family Protection Plan (10 U.S.C. § 1431 et seq.), and the Survivor Benefit Plan (10 U.S.C. § 1447 et seq.). The serviceman may elect not to participate in either plan. (10 U.S.C. §§ 1431(b), 1448(a).) Both plans allow the serviceman to designate the surviving children as the beneficiaries, instead of the spouse.[10] (10 U.S.C. §§ 1434(a), 1450(a).) Unlike the railroad retirement scheme, these annuities are not payable until the serviceman's death. Nor is a surviving spouse's annuity absolutely

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[10]An unmarried serviceman with no dependent children may designate any natural person with an insurable interest in him as the beneficiary under the Survivor Benefit Plan. (10 U.S.C. §§ 1450(a)(4), 1448(b).) Mr. Milhan allots $7.66 out of each retirement paycheck towards the purchase of an annuity payable to his surviving children until they reach 18 years of age. As of the postremittitur hearing, only one child remained eligible to receive this benefit. Mrs. Milhan has not been designated as a beneficiary.

cut off even upon remarriage. The spouse may continue receiving an annuity if the remarriage occurs after the spouse reaches age 60. (10 U.S.C. §§ 1434(a), 1450(b).) If a remarriage entered into prior to age 60 is dissolved, the spouse may resume receiving an annuity due under the Survivor Benefit Plan. (10 U.S.C. § 1450(b).)

Both the structure and the legislative history of the annuity plans available for military spouses indicate that they were designed to alleviate hardship caused by the serviceman's death. (See 1972 U.S. Code Cong. & Admin. News, at pp. 3288-3328.) Thus in contrast to the Railroad Retirement System, Congress did not enact a spousal benefit designed to reflect the contribution of military spouses to the marital community. Accordingly, there is no basis for inferring a congressional intent to cut off the California community property rights of military spouses. As stated in *Fithian, supra,* 10 Cal.3d at page 600, "Congress' concern for the welfare of soliders' widows sheds little light on Congress' attitude toward the community treatment of retirement benefits, particularly since those benefits do not survive the serviceman regardless of his marital status at death."

The Veterans' Administration disability pay which was received in lieu of retirement pay presents a different issue. Disabled servicemen have two options under 10 United States Code section 1401, which governs the computation of retirement pay for all of the armed services. First, retirement pay may be computed solely on the basis of rank and length of service. Under *Fithian,* all of this amount is community property to the extent earned by service during marriage. Second, retirement pay may be computed by multiplying basic pay times the percentage of disability before retirement. *In re Marriage of Stenquist, supra,* 21 Cal.3d 779, held that selection of the "disability" computation does not defeat the community interest in the

amount of retirement pay that would have been due based on rank and length of service. Only the excess of the "disability" pension over the latter amount was held to be separate property.[11]

(3) Mr. Milhan opted to receive a pension administered by the Veterans' Administration. This pension is computed solely on the basis of his disability. (See 38 U.S.C. §§ 314, 334.) In order to receive this benefit, Mr. Milhan waived his right to an equivalent amount of retirement pay. (38 U.S.C. § 3105.) The reasoning of *Stenquist* applies with equal force to this situation and to title 10 disability benefits. However classified for administrative purposes, disability benefits under *Stenquist* are separate property in California only insofar as they exceed the amount of retirement pay waived. Significantly, Mr. Milhan does not appear to contest this proposition. Instead, he contends that under *Hisquierdo* the rule in *Stenquist* violates the supremacy clause of the United States Constitution.

This contention lacks merit. Insofar as disability benefits replace retirement pay waived as a condition of receipt, they perform the same functions as retirement pay. (*Stenquist, supra,* 21 Cal.3d at p. 787.) Since the division of military retirement pay as community property does not violate federal supremacy, it follows that no substantial federal interest is damaged by the division of "disability" benefits which serve identical purposes.

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[11]The court reasoned that a spouse should not be allowed to defeat the community interest by invoking a condition solely within his or her control. Moreover, the court recognized that as a practical matter only the excess over straight retirement pay is attributable to the disability: " 'It would be unjust to deprive wife of a valuable property right simply because a misleading label has been affixed to husband's pension fund benefits' " (*Stenquist, supra,* 21 Cal.3d at pp. 786-787. Citation omitted.)

Mr. Milhan's attempt to avoid state law by citing the "spendthrift" provision the Veterans' Administration applies to the benefits it administers would substitute a "conflict in words" for the practical clash of interests which the Supreme Court has required for preemption.[12] (*Hisquierdo, supra,* 439 U.S. at p. 581 [59 L.Ed.2d at pp. 10-11].)
(4) Where a practical understanding of state and federal objectives demonstrates that both may be fully achieved, comity precludes the preemption of state law based only on semantic inconsistencies. (Cf. *Merrill, Lynch, Pierce, Fenner & Smith v. Ware* (1973) 414 U.S. 117 [38 L.Ed.2d 348, 94 S.Ct. 383]; *Huron Cement Co. v. Detroit* (1960) 362 U.S. 440 [4 L.Ed.2d 852, 80 S.Ct. 813, 78 A.L.R.2d 1294].)

(5) Next, Mr. Milhan contends that under *Hisquierdo* federal supremacy precludes an award to Mrs. Milhan of property equivalent to her community interest in the military insurance policies. He argues that 38 United States Code section 3101(a) is analogous to the statute in *Hisquierdo* which precluded the assertion of state community property

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[12] "Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . . ." (38 U.S.C. § 3101(a)).

Significantly, this provision does not apply to disability benefits distributed as retirement pay under title 10 of the United States Code, since these benefits are not administered by the Veterans' Administration. This limited scope militates against a finding that section 3101(a) manifests a congressional intent to preempt application of state community property claims to all payments classified as "disability" benefits by federal statutes.

claims against railroad pensions.[13] However, section 3101(a) applies only to the "[p]ayments of benefits due" under laws administered by the Veterans' Administration. While this language shields insurance policy proceeds paid to the *named beneficiary*, it does not extend any protection to the *insured* as such. So long as there is no interference with the beneficiary's exclusive enjoyment of the proceeds, section 3101(a) poses no bar to any state claim.

The limited scope of section 3101(a) highlights a more fundamental distinction between *Hisquierdo* and this case. *Hisquierdo* disapproved the award of other property to compensate spouses for their community property interest in rilroad pensions. The court stated this would "impair [railroad pensioners'] economic security just as surely as would a regular deduction from [their] benefit check."[14] (*Hisquierdo, supra*, 439 U.S. at p. 588 [59 L.Ed.2d at p. 15].) However, there is no corresponding federal interest in securing Mr. Milhan's economic stake in the military insurance policies. Rather, the United States Supreme Court has determined that the pertinent federal objective is to secure the policyholder's choice as to who will receive the proceeds of the policies. (*Wissner v. Wissner, supra*, 338 U.S. at pp. 658-659 [94 L.Ed at pp. 428-429].)

This objective was not blunted when Mrs. Milhan was awarded a sum equivalent to her share of the cash surrender value of the insurance policies. Payment of such a sum by

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[13]*Ante*, page 776.

Mr. Milhan cites former section 454a in 38 United States Code, which has been repealed. 38 United States Code section 310(a) is the analogue to the former section 454a.

[14]The court also relied on the prohibition against "anticipation" of railroad pension benefits which is contained in 45 United States Code section 231m. (*Hisquierdo, supra*, 439 U.S. at pp. 588-589 [59 L.Ed.2d at pp. 14-16].) No such prohibition appears in 38 United States Code Section 3101(a). (*Ante*, p. 771, fn. 6.)

Mr. Milhan would allow him to "retain both policies in force, along with the right to change the beneficiaries thereunder." (*Milhan I, supra,* 13 Cal.3d at p. 133.) Moreover, the beneficiary designated by Mr. Milhan would receive the full benefit of the policy. Under these circumstances, the suggestion that *Hisquierdo* forbade the grant of an offsetting award to Mrs. Milhan ignores the admonition that " 'major damage' " to " 'clear and substantial' " federal interests is necessary before the supremacy clause will override state law. (*Hisquierdo, supra,* 439 U.S. at p. 581 [59 L.Ed.2d at p. 11]. Citation omitted.)

III.

Mr. Milhan asserts three additional errors in the judgment. First, he contends that the trial court abused its discretion in refusing to credit certain payments against the award of back retirement pay. (See *Schubert v. Bates* (1947) 30 Cal.2d 785, 789 [185 P.2d 793].) (6) However, setoff is not ordinarily available where restitution of property awarded under a judgment subsequently reversed is sought by motion, rather than in an independent action. (See *Buckman v. Tucker* (1937) 9 Cal.2d 403, 406 [71 P.2d 69].) Though restitution may be denied where necessary to avoid inequity (see *Schubert v. Bates, supra,* 30 Cal.2d at p. 791; *Palpar, Inc. v. Thayer* (1949) 91 Cal.App.2d 176, 178 [204 P.2d 654]), the record does not show that the trial court abused its discretion in granting restitution in this case.

It was not for the trial court to attempt to compensate Mr. Milhan for an alleged overpayment of taxes on his mistaken assumption that all of his retirement pay was separate property. Nor was Mr. Milhan entitled to reimbursement for the amounts he paid toward the childrens' college expenses, since he testified that he did not expect repayment. Mr. Milhan's modest monthly payments on the annuity he pur-

chased for his surviving children were also gifts, and similarly failed to give rise to any legal debt on the part of Mrs. Milhan.

(7) Next, Mr. Milhan contends that the trial court erred in awarding interest from the date on which this court's remittitur was filed, January 16, 1975, rather than the date on which the present judgment was entered, March 7, 1978. When a judgment is reversed on appeal, a new award subsequently entered by the trial court can bear interest only from the date of the new judgment. (*Snapp v. State Farm Fire & Cas. Co.* (1964) 60 Cal.2d 816, 819 [36 Cal.Rptr. 612, 388 P.2d 884].) However, the remittitur in this case in effect ordered the trial court to enter judgment in Mrs. Milhan's favor on the contested items of property. The filing of this remittitur in accordance with Code of Civil Procedure section 912, fully defined and protected the rights of the parties. (See *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 654 [242 P.2d 1].) The trial court had only to apply equitable principles governing the *enforcement* of these rights. Accordingly, the filing of the remittitur constituted the entry of judgment for purposes of determining the date from which interest may run. (Cf. *Allen v. Paradise Grange No. 490, Inc.* (1959) 176 Cal.App.2d 227 [1 Cal.Rptr. 220].)

(8) Finally, Mr. Milhan contends that the trial court erred in awarding Mrs. Milhan $1,500 attorneys' fees without an adequate showing of need. Civil Code section 4370 authorizes the award of such attorneys' fees "as may be reasonably necessary" to maintain the proceeding. An award pursuant to this section "is within the trial court's discretion, and will be disturbed on appeal only upon a clear showing of abuse." (In re Marriage of Aufmuth (1979) 89 Cal.App.3d 446, 466 [152 Cal.Rptr. 688]; *In re Marriage of Janssen* (1975) 48 Cal.App.3d 425, 428 [121 Cal.Rptr.

701].) The record indicates that Mrs. Milhan had a net monthly income of only $770, while her monthly expenses were $1,119. Exclusively of attorneys' fees, Mrs. Milhan's debts were $60,000. Including half of the community property, from her present marriage, Mrs. Milhan's assets amounted to $21,950. This evidence was sufficient to support the trial court's finding of need. There was no abuse of discretion.

(9) One issue remains. Mrs. Milhan contends that the trial court erred in refusing to order restitution of her share of retirement benefits paid between the 1970 dissolution and the 1972 property division. The contention has merit. The trial court was under a mandatory duty to divide the community property equally. (Civ. Code, § 4800, subd. (a).) Mr. Milhan's stipulation at his wife's request to entry of dissolution in 1970 did not affect the status of the retirement benefits received. (See Civ. Code, § 5110.) Nor did it establish a valid equitable defense to enforcement of her community property rights. Mrs. Milhan is entitled to her share of the 1970-1972 retirement benefits unless on remand Mr. Milhan is able to demonstrate that an equal overall distribution of community property has already been achieved or that restitution would be inequitable. (See *Schubert v. Bates, supra*, 30 Cal.2d at p. 791.)

IV.

Congress has not precluded the application of California community property law to military retirement pay, military insurance policies, or disability pay to the extent received in lieu of retirement.

That part of the judgment which failed to award Mrs. Milhan a community property share in the Veteran's Administration disability pay received by Mr. Milhan in lieu of retirement pay, and failed to divide the retirement pay from

the date of trial in 1970, is reversed. In all other respects, the judgment is affirmed. Mr. Milhan shall assume all costs on appeal.

Tobriner, J., Mosk, J., Clark, J., Richardson, J., Manuel, J., and Newman, J., concurred.

APPENDIX "B."

10 U.S.C. § 6323:

"(a) An officer of the Navy or the Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

(b) For the purposes of this section—

(1) an officer's years of active service are computed by adding all his active service in the armed forces; and

(2) his years of service as a commissioned officer are computed by adding all his active service in the armed forces under permanent of temporary appointments in grades above warrant officer, W-1.

(c) Unless otherwise entitled to a higher grade, each officer retired under this section shall be retired—

(1) in the highest grade, permanent or temporary, in which he served satisfactorily on active duty as determined by the Secretary of the Navy; or

(2) if the Secretary determines that he did not serve satisfactorily in his highest temporary grade, in the next lower grade in which he has served, but not lower than his permanent grade.

. . .

(e) Unless otherwise entitled to higher pay, an officer retired under this section is entitled to retired pay at the rate of 2½ percent of the basic pay of the grade in which retired multiplied by the number of years of service that may be credited to him under section 1405 of this title, but the retired pay may not be more than 75 percent of the basic

pay upon which the computations of retired pay is based. . . .''

10 U.S.C. § 1431:

(b) To provide an annuity under section 1434 of this title, a person covered by subsection (a) may elect to receive a reduced amount of the retired pay or retainer pay to which he may become entitled as a result of service in his armed force.

10 U.S.C. § 1434:

(a) The annuity that a person is entitled to elect under section 1431 or 1432 of this title shall, in conformance with actuarial tables selected by the Board of Actuaries under section 1436(a) of this title, be the amount specified by the elector at the time of the election, but not more than 50 per centum nor less than 12½ per centum of his retired or retainer pay, in no case less than $25. He may make the annuity payable—

(1) to, or on behalf of, the surviving spouse, ending when the spouse dies or, if the spouse remarries before age 60, when the spouse remarries;

10 U.S.C. § 1447:

(3) ''Widow'' means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—

(A) was married to him for at least one year immediately before his death; or

(B) is the mother of issue by that marriage.

10 U.S.C. § 1440:

No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process.

10 U.S.C. § 1450:

(b) An annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost. An annuity for a widow or widower shall be paid to the widow or widower while the widow or widower is living or, if the widow or widower remarries before reaching age 60, until the widow or widower remarries.

10 U.S.C. § 2771:

(a) In the settlement of the accounts of a deceased member of the armed forces who dies after December 31, 1955, an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned.

(2) Surviving spouse.

10 U.S.C. § 6481:

In time of war or national emergency declared by the President, the Secretary of the Navy may order any retired officer of the Regular Navy or the Regular Marine Corps to active duty at sea or on shore. At any other time the Secretary may order such a retired officer to active duty at sea or on shore only with his consent.

10 U.S.C. § 7601:

(a) Such stores as the Secretary of the Navy designates may be procured and sold to members of the naval service, members of the Coast Guard, and widows of such members.

31 U.S.C. § 203:

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may

be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, except as hereinafter provided, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

37 U.S.C. § 701:

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable.

(c) An enlisted member of the Army or the Air Force may not assign his pay, and if he does so, the assignment is void.

37 U.S.C. § 705:

Each assignment of pay due an enlisted member of the Navy or Marine Corps and each power of attorney or other authority to draw, receipt for, or transfer that pay, is void, unless attested by the member's commanding officer and the disbursing officer having custody of the member's pay record. An assignment of pay shall state the date when the transfer of pay to the assignee is to begin.

37 U.S.C. § 801:

(c) Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force the Regular Marine Corps, the Regular Coast Guard, the Environmental Science Services Administration, or the Public Health Service, who is engaged for himself or others in selling, or contracting

or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service.

38 U.S.C. § 3105:

Any person who is receiving pay pursuant to any provision of law providing retired or retirement pay to persons in the Armed Forces, or as a commissioned officer of the National Oceanic and Atmospheric Administration or of the Public Health Service, and who would be eligible to receive pension or compensation under the laws administered by the Veterans' Administration if he were not receiving such retired or retirement pay, shall be entitled to receive such pension or compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of his retired or retirement pay as is equal in amount to such pension or compensation.

5 U.S.C. § 8345:

(j)(1) Payments under this subchapter which would otherwise be made to an employee, Member, or annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation. Any payment under this paragraph to a person bars recovery by any other person.

Cal. Civ. Code § 5105:

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall

be construed as defining the respective interests and rights of husband and wife in community property.

Cal. Civ. Code § 5107:

All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

Cal. Civ. Code § 5108:

All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property. The husband may, without the consent of his wife, convey his separate property.

Cal. Civ. Code § 5125:

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without valuable consideration, without the written consent of the other spouse.

United States Constitution, Article VI, Clause 2.

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, anything on the Constitution or the laws of any State to the contrary notwithstanding."